

CR 2011/45 - Income tax: sale of Ricegrowers Limited shares and Proposed Dividend



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Class Ruling

Income tax: sale of Ricegrowers Limited shares and Proposed Dividend

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	9
Scheme	10
Ruling	27
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
Explanation	45
Appendix 2:	
Detailed contents list	102

ⓘ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 44(1) of the ITAA 1936;
- Division 1A of former Part IIIA of the ITAA 1936;
- former section 160APHM of the ITAA 1936;
- former section 160APHN of the ITAA 1936;
- section 177EA of the ITAA 1936;
- Division 67 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- section 67-25 of the ITAA 1997;
- section 104-10 of the ITAA 1997;

- subsection 116-20(1) of the ITAA 1997;
- section 118-20 of the ITAA 1997;
- paragraph 204-30(3)(c) of the ITAA 1997;
- section 207-20 of the ITAA 1997;
- section 207-145 of the ITAA 1997; and
- Division 208 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise indicated.

Class of entities

3. The class of entities to which this Ruling applies is the B Class shareholders in Ricegrowers Limited (hereafter referred to as SunRice) who:

- are residents of Australia as defined in subsection 6(1) of the ITAA 1936;
- hold their SunRice B Class shares on capital account;
- receive the SunRice Dividend;
- dispose of their shares in SunRice to Ebro Foods S.A. (Ebro) under the Scheme of Arrangement; and
- are not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on their SunRice shares.

Note: Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.

4. In this Ruling, a person belonging to this class of entities is referred to as a 'SunRice B Class Shareholder.'

Qualifications

5. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 26 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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Date of effect

9. This Ruling applies from 1 July 2010 to 30 June 2011. The Ruling continues to apply after 30 June 2011 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

10. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Class Ruling application, including appendices, from PricewaterhouseCoopers (PwC) dated 10 December 2010;
- Scheme Implementation Agreement dated 25 November 2010; and
- Correspondence from PwC dated 22 December 2010, 2 February 2011, 31 March 2011 and 5 April 2011.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

SunRice

11. SunRice is an Australian resident public company that was formed from Ricegrowers Cooperative Limited, and later became registered under the *Corporations Act 2001* (Corporations Act) on 14 December 2005. SunRice was admitted to the official list of the National Stock Exchange (NSX) through the listing of its B Class shares on 18 June 2007. SunRice's activities include sourcing, receiving and storing paddy rice, milling rice, manufacturing, processing, and marketing rice and related products.

12. SunRice's share capital structure comprises of A Class preference shares and B Class ordinary shares. At 30 November 2010, SunRice had 797 unlisted A Class shares held by 797 'active growers' and 54,701,988 listed B Class shares on issue held by approximately 2,107 persons and entities.

13. A Class shares confer rights to vote without any entitlements to dividends and can only be held by 'active growers', being persons who have supplied paddy rice to SunRice in the past two years. The maximum number of A Class shares held by a grower is five and each A Class shareholder has one vote regardless of the number of shares held. Also, each holder of A Class shares must hold at least 1,000 B Class shares.

14. B Class shares are non-voting shares with rights to distributions of profits (dividends) and capital. Trading in B Class shares is on a restricted basis, and, generally speaking, they are only transferable to members of SunRice or related member entities such as former and current growers and employees. A very small portion of the current SunRice B Class shares are pre-CGT shares. Similarly, a very small portion of the current SunRice B Class shares are held by non-residents.

15. Under Clause 4.2 of the SunRice constitution, the number of B Class shares held by a person, aggregated with any B Class shares held by all associates of that person could not exceed 5 percent of the total number of issued B Class shares.

Ebro

16. Ebro is the leading corporate group in the Spanish food sector by turnover, profits, market capitalisation and international presence. Ebro is one of the world's largest suppliers of branded rice and the world's second largest manufacturer of pasta.

17. The company's shares are listed on the Bolsa de Madrid and form part of the blue-chip IBEX 35 index as of January 2010.

The Scheme of Arrangement

18. On 25 November 2010, SunRice and Ebro entered into a Scheme Implementation Agreement under which Ebro will acquire 100% of the issued capital in SunRice by way of a Scheme of Arrangement under section 411 of the Corporations Act.
19. A court ordered Scheme Meeting of SunRice shareholders will be held on 31 May 2011 at which a resolution will be put seeking approval for the Scheme of Arrangement.
20. Immediately following the Scheme Meeting on 31 May 2011, an Extraordinary General Meeting will be held at which two resolutions to amend the constitution will be put to the shareholders.
21. The Scheme Record Date will be 16 June 2011 and the Implementation Date will be 17 June 2011.

Scheme consideration

22. Under clause 4.2 of the Scheme Implementation Agreement, the Scheme consideration will be \$3.618 in cash for each B Class share (or \$5.025 in cash if the Board of Directors of SunRice revokes their decision to pay the SunRice Dividend).

SunRice Dividend

23. SunRice will pay a special dividend to each SunRice B Class Shareholder subject to the necessary declaration by the Board of Directors. The SunRice Dividend will be \$1.407 per B Class share and will be fully franked.
24. The SunRice Dividend will be sourced entirely from SunRice's retained earnings. SunRice has a franking account balance of \$35,146,788 as at 30 November 2010. The allocation of franking credits to the dividend will utilise approximately \$32,985,265 of the available franking credits.
25. The SunRice Dividend will be funded by Ebro. Ebro has agreed that on the SunRice Dividend Record Date it will make an Implementation Subscription Payment to subscribe for new C Class shares in SunRice and SunRice has agreed that it will use the funds from the subscription to pay the SunRice Dividend. Under clause 5.3(d) of the Scheme Implementation Agreement, SunRice may terminate the Scheme of Arrangement if Ebro does not make the Implementation Subscription Payment.
26. If the SunRice Dividend is paid, the SunRice Dividend record date will be 9 June 2011, and the SunRice Dividend payment date will be 10 June 2011.

Ruling

SunRice Dividend

27. The SunRice Dividend of \$1.407 per B Class share will constitute a dividend as defined in subsection 6(1) of the ITAA 1936.

Assessability of the SunRice Dividend

28. A SunRice B Class Shareholder who receives the fully franked SunRice Dividend is required to include the SunRice Dividend as assessable income under subparagraph 44(1)(a)(i) of the ITAA 1936.

Gross up and tax offset

29. A SunRice B Class Shareholder who directly receives the fully franked SunRice Dividend will:

- include the amount of the franking credit attached to the SunRice Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit

under section 207-20, subject to being a qualified person.

30. A SunRice B Class Shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the SunRice Dividend in their assessable income under subsection 207-35(1), subject to the qualified person rule.

Qualified persons

31. The payment of the SunRice Dividend as part of the Scheme of Arrangement will constitute a related payment within the meaning of former section 160APHN of the ITAA 1936.

32. Accordingly, each SunRice B Class Shareholder will need to hold their shares at risk for a continuous period of at least 45 days in the secondary qualification period in order to be a qualified person in respect of the SunRice Dividend.

33. Each SunRice B Class Shareholder will no longer be considered to hold their SunRice B Class shares 'at risk' for the purposes of Division 1A of former Part IIIA of the ITAA 1936 (former Division 1A) from the Scheme Record Date of 16 June 2011. Therefore, a SunRice B Class Shareholder will be a qualified person in relation to the SunRice Dividend if, from 26 April 2011 until 15 June 2011 inclusive, the SunRice B Class Shareholder continued to hold the SunRice B Class share and did not have 'materially diminished risks of loss or opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of the SunRice B Class shares for a continuous period of at least 45 days.

Exempting Entity

34. SunRice will not be an exempting entity under Division 208 at the time of the SunRice Dividend.

Refundable tax offset

35. The franking credit allocated to the SunRice Dividend will be subject to the refundable tax offset rules in Division 67, provided the participating SunRice B Class Shareholder is not excluded by the operation of section 67-25.

Capital gains tax (CGT) consequences**CGT event A1**

36. CGT event A1 will happen when a SunRice B Class Shareholder disposes of each of their SunRice B Class shares to Ebro (subsections 104-10(1) and 104-10(2)).

37. The time of the CGT event A1 will be the Scheme Implementation Date of 17 June 2011 (paragraph 104-10(3)(b)).

38. A SunRice B Class Shareholder will make a capital gain from CGT event A1 happening if the capital proceeds from the disposal of a SunRice B Class share exceeds its cost base. The capital gain is equal to the amount of the excess. A SunRice B Class Shareholder will make a capital loss if those capital proceeds are less than the SunRice B Class share's reduced cost base (subsection 104-10(4)). The capital loss is equal to the amount of the difference.

39. Any capital gain or capital loss made on the disposal of SunRice B Class shares that were taken to have been acquired before 20 September 1985 will be disregarded (paragraph 104-10(5)(a)).

Capital Proceeds

40. The capital proceeds received by a SunRice B Class Shareholder will be the money that the shareholder receives or is entitled to receive in respect of the event happening (subsection 116-20(1)).

41. The capital proceeds received by a SunRice B Class Shareholder who disposes of their SunRice B Class shares under the Scheme of Arrangement and who is entitled to the SunRice Dividend will be \$5.025 for each SunRice B Class share.

Anti-overlap provisions

42. Any capital gain made by a SunRice B Class Shareholder when CGT event A1 happens can be reduced (but not below zero) by the amount of the SunRice Dividend that is included in the SunRice B Class Shareholder's assessable income under subsection 44(1) of the ITAA 1936 (section 118-20). The amount of any capital loss made by a SunRice B Class Shareholder will not be adjusted by the amount of the SunRice Dividend.

The anti-avoidance provisions

43. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the SunRice Dividend.

44. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit received in relation to the SunRice Dividend paid in relation to a SunRice B Class share.

Commissioner of Taxation

11 May 2011

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

SunRice Dividend

45. The term 'dividend' is defined in subsection 6(1) of the ITAA 1936 and includes any distribution made by a company to any of its shareholders.

46. The payment of the SunRice Dividend is a distribution of money by SunRice to its shareholders.

47. However, paragraph (d) of the definition of 'dividend' in subsection 6(1) of the ITAA 1936 excludes from the definition of 'dividend' any:

moneys paid or credited by a company to a shareholder or any other property distributed by a company to shareholders (not being moneys or other property to which this paragraph by reason of subsection (4), does not apply or moneys paid or credited, or property distributed for the redemption or cancellation of a redeemable preference share), where the amount of the moneys paid or credited, or the amount of the value of the property, is debited against an amount standing to the credit of the share capital account of the company...

48. The SunRice Dividend will be sourced entirely from SunRice's retained earnings and SunRice will not debit the SunRice Dividend to its share capital account. Therefore, the exclusions in paragraph (d) will not apply and the SunRice Dividend will constitute a 'dividend' for the purposes of subsection 6(1) of the ITAA 1936.

Assessability of the SunRice Dividend

49. Subparagraph 44(1)(a)(i) of the ITAA 1936 includes in the assessable income of an Australian resident shareholder in a company:

dividends (other than non-share dividends) that are paid to the shareholder by the company out of profits derived by it from any source.

50. As the SunRice Dividend will be paid to SunRice B Class Shareholders out of profits derived by SunRice, each SunRice B Class Shareholder is required to include the SunRice Dividend as assessable income.

Gross up and tax offset

51. Section 207-20 provides:

- (1) If an entity makes a franked distribution to another entity, the assessable income of the receiving entity, for the income year in which the distribution is made, includes the amount of the franking credit on the distribution. This is in addition to any other amount included in the receiving entity's assessable income in relation to the distribution under any other provision of this Act.
- (2) The receiving entity is entitled to a tax offset for the income year in which the distribution is made. The tax offset is equal to the franking credit on the distribution.

52. Therefore, subject to satisfying the qualified person rule, where the fully franked SunRice Dividend is received directly by a SunRice B Class Shareholder, the SunRice B Class Shareholder will:

- include the amount of the franking credit attached to the SunRice Dividend in their assessable income; and
- be entitled to a tax offset equal to the amount of the franking credit.

53. Where the fully franked SunRice Dividend is received by a SunRice B Class Shareholder (not being an entity taxed as a corporate tax entity) that is a trustee of a trust (not being a complying superannuation fund) or a partnership, subsection 207-35(1) applies, subject to the trustee or partnership being a qualified person. Subsection 207-35(1) provides:

If:

- (a) a franked distribution is made in an income year to an entity that is a partnership or the trustee of a trust; and
- (b) the entity is not a corporate tax entity when the distribution is made; and
- (c) if the entity is the trustee of a trust – the trust is not a complying superannuation entity or FHSA trust when the distribution is made;

the assessable income of the partnership or trust for that income year includes the amount of the franking credit on the distribution.

54. Therefore, subject to satisfying the qualified person rule, a SunRice B Class Shareholder that is a trust or a partnership will be required to include the amount of the franking credit attached to the SunRice Dividend in their assessable income under subsection 207-35(1).

Refundable tax offset

55. Shareholders who are entitled to a tax offset under subsection 207-20(2), in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

56. Pursuant to section 67-25, there are a range of taxpayers who are specifically excluded from the operation of the refundable tax offset rules. This range of excluded entities includes:

- non-complying superannuation funds or non-complying approved deposit funds (subsection 67-25(1A));
- a trustee of a trust who is liable to be assessed under section 98 or 99A of the ITAA 1936 (subsection 67-25(1B));
- corporate tax entities, unless the entity is an exempt institution that is eligible for a refund, or a life insurance company that has received distributions on membership interests which were not held by the company on behalf of its shareholders (subsections 67-25(1C) and 67-25(1D)); and
- foreign resident entities carrying on business in Australia at or through a permanent establishment (subsection 67-25(1DA)).

57. Accordingly, a holder of SunRice B Class shares will be subject to the refundable tax offset rules unless they are listed specifically as one of the excluded entities under section 67-25. Generally, corporate tax entities (including companies, corporate limited partnerships, corporate unit trusts, and public trading trusts) will be excluded from the operation of the refundable tax offset rules.

Qualified persons

58. Former Division 1A of the ITAA 1936 contains the measures known as the holding period rule and the related payment rule. In broad terms, former Division 1A provides the statutory tests that must be satisfied for a taxpayer to be a 'qualified person' with respect to a franked distribution they have received and thus be entitled to a tax offset for the franking credit attached to the distribution.

59. The test of what constitutes a 'qualified person' is provided in former subsection 160APHO(1) of the ITAA 1936 as follows:

A taxpayer who has held shares or an interest in shares on which a dividend has been paid is a qualified person in relation to the dividend if:

- (a) where neither the taxpayer nor an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the primary qualification period in relation to the dividend; or
- (b) where the taxpayer or an associate of the taxpayer has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend – the taxpayer has satisfied subsection (2) in relation to the secondary qualification in relation to the dividend.

60. Former subsection 160APHO(2) of the ITAA 1936, referred to in paragraph 59 of this Ruling, sets out the holding period requirement. Broadly, if a taxpayer is not under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the primary qualification period. If a taxpayer is under an obligation to make a related payment in relation to a dividend or distribution, the taxpayer will have to satisfy the holding period requirement within the secondary qualification period.

Related payment rule

61. In order to determine the relevant qualification period, it is necessary to determine whether, under the present arrangement, the SunRice B Class Shareholders are considered to be under an obligation to make a related payment.

62. Former section 160APHN of the ITAA 1936 provides non-definitive examples of what constitutes the making of a related payment for the purposes of former Division 1A of the ITAA 1936. Former subsection 160APHN(2) of the ITAA 1936 provides:

The taxpayer or associate is taken, for the purposes of this Division to have made, to be under an obligation to make, or to be likely to make, a related payment in respect of the dividend or distribution if, under an arrangement, the taxpayer or associate has done, is under an obligation to do, or may reasonably be expected to do, as the case may be, anything having the effect of passing the benefit of the dividend or distribution to one or more other persons.

63. Former subsection 160APHN(3) of the ITAA 1936 states:

Without limiting subsection (2), the doing of any of the following by the taxpayer or an associate of the taxpayer in the circumstances mentioned in subsection (4) may have the effect of passing the benefit of the dividend or distribution to one or more other person:

- (a) causing a payment or payments to be made to, or in accordance with the directions of, the other person or other persons; or
- (b) causing an amount or amounts to be credited to, or applied for the benefit of, the other person or other persons; or
- (c) causing services to be provided to, or in accordance with the directions of, the other person or other persons; or
- (d) causing property to be transferred to, or in accordance with the directions of, the other person or other persons; or
- (e) allowing any property or money to be used by the other person or other persons or by someone nominated by the other person or other persons; or
- (f) causing an amount or amounts to be set off against, or to be otherwise applied in reduction of, a debt or debts owed by the other person or other persons to the taxpayer or associate; or
- (g) agreeing to treat an amount or amounts owed to the other person or other persons by the taxpayer or associate as having been increased.

64. Former subsection 160APHN(4) of the ITAA 1936 states:

The circumstances referred to in subsection (3), are where:

- (a) the amount or the sum of the amounts paid, credited or applied; or
- (b) the value or the sum of the values of the services provided, of the property transferred or of the use of the property or money; or
- (c) the amount or the sum of the amounts of the set-offs, reductions or increases;

as the case may be:

- (d) is, or may reasonably be expected to be, equal to; or
- (e) approximates or may reasonably be expected to approximate; or
- (f) is calculated by reference to;

the amount of dividend or distribution.

65. In the current circumstances, it is considered that an integral part of the Scheme of Arrangement is the payment of the SunRice Dividend of \$1.407 per share to the SunRice B Class Shareholders. The payment of the SunRice Dividend is conditional upon the Scheme of Arrangement proceeding, tying the payment of the SunRice Dividend to the disposal of the SunRice B Class shares. Further, if the payment of the SunRice Dividend is not paid, the consideration to be paid to SunRice B Class Shareholders for the disposal of their SunRice B Class shares to Ebro is increased by the amount of the unpaid dividend.

66. In these circumstances, in determining whether a SunRice B Class Shareholder is taken to have made or be likely to make a related payment in respect of the SunRice Dividend, it is considered that the circumstances surrounding the payment of the SunRice Dividend would constitute an act that passes the benefit to another for the purposes of former subsection 160APHN(3) of the ITAA 1936. As such, it can be concluded that a SunRice B Class Shareholder will be taken to have made a related payment in respect of the SunRice Dividend.

Holding period requirement

67. As the SunRice B Class Shareholders will be taken, for the purposes of former Division 1A of the ITAA 1936 to have made a related payment in respect of the SunRice Dividend, the relevant holding period is the secondary qualification period pursuant to former paragraph 160APHO(1)(b) of the ITAA 1936.

68. The secondary qualification period is defined in former section 160APHD of the ITAA 1936 as follows:

In relation to a taxpayer in relation to shares or an interest in shares means:

- (a) If the shares are not preference shares – the period beginning on the 45th day before, and ending on the 45th day after, the day on which the shares or interest becomes ex dividend...

69. The concept of 'ex dividend' is defined by former subsection 160APHE(1) of the ITAA 1936 as follows:

a share in respect of which a dividend is to be paid, or an interest (other than an interest as a beneficiary of a widely held trust) in such a share, becomes ex dividend on the day after the last day on which the acquisition by a person of the share will entitle the person to receive the dividend.

70. Eligibility for the SunRice Dividend is determined on the SunRice Dividend record date of 9 June 2011. This is the last day on which acquisition by a person of a SunRice B Class share entitled the person to receive the SunRice Dividend as per former section 160APHE of the ITAA 1936. Accordingly, the ex-dividend date for the purposes of former subsection 160APHE(1) is 10 June 2011.

71. The secondary qualification period thus runs from 45 days before the ex-dividend date of 10 June 2011, as determined in paragraph 70, and ends 45 days after that day. In practical terms, this means that the secondary qualification period runs from 26 April 2011 to 25 July 2011. However, pursuant to former subsection 160APHO(3) of the ITAA 1936, any days on which a taxpayer has materially diminished risks of loss or opportunities for gain in respect of the SunRice B Class shares are to be excluded. This would mean that the secondary qualification period would run from 26 April 2011 until the date that SunRice B Class Shareholders are no longer at risk for the purposes of former Division 1A of the ITAA 1936.

72. Entitlement to participate in the Scheme of Arrangement will be determined on the Scheme Record Date, which is 16 June 2011. SunRice B Class Shareholders who dispose of their shares under the Scheme of Arrangement will no longer be considered to hold their SunRice B Class shares 'at risk' for the purposes of former Division 1A of the ITAA 1936 as at 16 June 2011, as the date of disposal or acquisition cannot count towards the satisfaction of the qualification period pursuant to former section 160APHO of the ITAA 1936.

73. Accordingly, for a SunRice B Class Shareholder who disposes of their shares under the Scheme of Arrangement, the secondary qualification period will run from 26 April 2011 to 15 June 2011 (inclusive). A SunRice B Class Shareholder who receives the SunRice Dividend will need to hold their shares at risk for a continuous period of not less than 45 days during this period in order to be a 'qualified person' for the purposes of former Division 1A of the ITAA 1936.

Exempting entity

74. Section 208-20 states that a corporate tax entity is an exempting entity at a particular time if it is effectively owned by prescribed persons at that time. Subsection 208-25(1) provides, in broad terms, that an entity is effectively owned by prescribed persons if not less than 95% of accountable membership interests or accountable partial interests (broadly direct and indirect ownership interests) are held by or on behalf of prescribed persons.

75. Section 208-40 provides the definition of a prescribed person in relation to another corporate tax entity. The definition includes companies, trustees, partnerships or individuals that are a foreign resident or if they were to receive a distribution by the corporate tax entity, the distribution would be exempt income or non-assessable non-exempt income of the company, trust estate, partnership or individual.

76. Based on SunRice's shareholder register as at 30 November 2010 and taking into account Ebro's interest in the C Class shares, the total percentage of non-resident shareholder ownership in the accountable membership interests of SunRice does not amount to SunRice being effectively controlled by prescribed persons. Accordingly, SunRice will not be an exempting entity under Division 208.

Capital gains tax consequences

77. The CGT consequences that arise from the scheme that is the subject of this Ruling are outlined in the Ruling part of this document. Therefore, no further explanation is warranted other than in respect of one issue of interpretation. This concerns the proper characterisation of the SunRice Dividend for CGT purposes.

78. The capital proceeds from a CGT event includes, relevantly, the money received or entitled to be received in respect of the event happening (subsection 116-20(1)).

79. The phrase 'in respect of the event happening' in subsection 116-20(1) requires that the relationship between the event and the receipt of the money, or entitlement to receive the money, must be more than coincidental. An amount is not 'capital proceeds' of an event merely because it is received in association with the event.

80. A SunRice B Class Shareholder who disposes of a SunRice B Class share under the Scheme of Arrangement and who is entitled to the SunRice Dividend will receive \$5.025 cash. This is made up of the SunRice Dividend being \$1.407 from SunRice and the Scheme Consideration of \$3.618 (being \$5.025 reduced by the amount of the SunRice Dividend) payable by Ebro.

81. A dividend declared by a company that is subject to a takeover can form part of the vendor shareholders' capital proceeds from the disposal of the shares. Taxation Ruling TR 2010/4 states at paragraph 9 that:

A dividend declared or paid by the target company to the vendor shareholder will be money or property that the vendor shareholder has received, or is entitled to receive, under the contract or the scheme of arrangement, in respect of the transfer of the shares if the vendor shareholder has bargained for the receipt of the dividend (whether or not in addition to other consideration) in return for giving up the shares. That is to say, if the dividend forms the whole or part of that sum of money or property in return for which the vendor shareholder is willing, and under the contract has promised or under the scheme of arrangement is bound, to transfer the shares in the target company, it will be capital proceeds in respect of the CGT event A1 happening.

82. In this case, the payment of the SunRice Dividend will not occur independently of the Scheme of Arrangement. This is primarily reflected in the following attributes:

- the Scheme Consideration offered of \$5.025 per SunRice B Class share is reduced by the amount of SunRice Dividend;
- the SunRice Dividend may only be paid if the Scheme becomes effective; and
- Ebro has consented to the payment of the SunRice Dividend and notably is funding the payment of the SunRice Dividend by subscribing for C Class shares in SunRice.

83. In light of these factors, it is considered that the SunRice Dividend is part of the sum of money in return for which the SunRice B Class Shareholders will have, by approving the Scheme of Arrangement, demonstrated their willingness to transfer the shares. Accordingly, the SunRice Dividend will form part of the capital proceeds which a SunRice B Class Shareholder will receive in respect of CGT event A1 happening.

The anti-avoidance provisions

Section 204-30

84. Section 204-30 applies where a corporate tax entity streams the payment of dividends, or the payment of dividends and the giving of other benefits, to its members in such a way that:

- (a) an imputation benefit is, or apart from this section would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a)); and
- (b) the member would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and

- (c) the other member of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

85. Relevantly, if section 204-30 applies, the Commissioner is vested with discretion under subsection 204-30(3) to make a determination in writing either:

- (a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member (paragraph 204-30(3)(a)); or
- (b) that no imputation benefit is to arise in respect of a distribution that is made to a favoured member and specified in the determination (paragraph 204-30(3)(c)).

86. For section 204-30 to apply, members to whom distributions are streamed must derive a greater benefit from franking credits than the members who consequently do not receive franking credits, or do not receive the same amount of franking credits as they would have had streaming not occurred.

87. Pursuant to the payment of the SunRice Dividend, all SunRice B Class Shareholders will receive an imputation benefit as a result of the dividend; the resident shareholders in the form of a tax offset (paragraph 204-30(6)(a)) and the non-resident shareholders in the form of an exemption from dividend withholding tax (paragraph 204-30(6)(e)). The resident shareholders will derive a greater benefit from franking credits than the non-resident shareholders (subsection 204-30(8)).

88. Under the current proposal, all SunRice B Class Shareholders should receive an imputation benefit as a result of the SunRice Dividend, however, A Class and C Class shareholders will not receive the SunRice Dividend in accordance with the terms of the respective classes of shares.

89. Furthermore, non-residents only hold a very small portion of the B Class shares. A Class shares are held by current growers, and C Class shares will be held by Ebro, a foreign resident.

90. However, A Class shareholders do not have entitlements to dividends.

91. In relation to C Class shares, Ebro will subscribe for these shares on the Dividend Record Date. The C Class shares entitle Ebro to an annual preferred dividend of London Interbank Offered Rate (LIBOR) plus 2.3%. The terms of the C Class shares do not entitle Ebro to the SunRice Dividend.

92. Therefore, there can be no preference between classes of shares as only B Class Shareholders are entitled to receive the SunRice Dividend. The dividends paid to SunRice B Class Shareholders will be fully franked with Australian franking credits.

93. Accordingly, it cannot be argued that SunRice will direct the flow of distributions in such a manner as to stream the imputation benefits such that one class of members will derive a greater benefit from the franking credits attached to the dividends, while other members will receive lesser or no imputation benefits.

94. As the conditions in subsection 204-30(1) for the provision to apply will not be met, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefit received in relation to the SunRice Dividend.

Section 177EA

95. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies to a wide range of schemes to obtain a tax advantage in relation to imputation benefits. Subsection 177EA(3) of the ITAA 1936 provides that section 177EA applies if:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity; and
- (b) either:
 - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
 - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be; and
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit; and
- (d) except for this section, a person (the 'relevant taxpayer') would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose, but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

96. If section 177EA of the ITAA 1936 applies, the Commissioner may make a determination under subsection 177EA(5) of the ITAA 1936 that either a franking debit arises to the company in respect of each distribution paid to the relevant taxpayer (paragraph 177EA(5)(a) of the ITAA 1936) or, in the alternative, that no franking credit benefit arises in respect of the distribution paid to the relevant taxpayer (paragraph 177EA(5)(b) of the ITAA 1936).

97. SunRice is a 'corporate tax entity' under section 960-115. The disposal of the B Class shares in SunRice pursuant to the Scheme of Arrangement is a scheme for the disposition of membership interests. The fully franked SunRice Dividend is a frankable distribution that will be paid as part of this scheme to SunRice B Class Shareholders who could, therefore, reasonably be expected to receive imputation benefits.

98. In the present case, the conditions of paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme it would be concluded that, on the part of SunRice, its shareholders or any other relevant party, there is a purpose of more than merely an incidental purpose of conferring an imputation benefit under the scheme.

99. In arriving at a conclusion the Commissioner must have regard to the relevant circumstances of the scheme which include, but are not limited to, the circumstances set out in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed there encompass a range of circumstances which taken individually or collectively could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may not be present at any one time in any one scheme.

100. The relevant circumstances of the arrangement indicate that there is no requisite purpose of conferring an imputation benefit under the arrangement. The SunRice Dividend will be fully franked, which is a continuation of SunRice's policy to pay fully franked dividends since 2009. Although SunRice has more than one class of shares on issue, only the B Class shares carry entitlements to dividends and capital rights. The A Class shares, which confer voting rights, have a nil amount paid up per share and do not carry any entitlements to dividends. The SunRice Dividend will be paid to existing B Class Shareholders of SunRice in proportion to their shareholding on SunRice Dividend Record Date. The amount of the SunRice Dividend will be sourced entirely from SunRice's retained profits and allows SunRice B Class Shareholders to share in the accumulated profits of SunRice.

101. Having regard to the relevant circumstances of the scheme, the Commissioner has come to the view that the requisite purpose is not present and, accordingly, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefit to be received in relation to the dividends.

Appendix 2 – Detailed contents list

102. The following is a detailed contents list for this Ruling:

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	5
Date of effect	9
Scheme	10
Ricegrowers Limited (SunRice)	11
Ebro Foods S. A. (Ebro)	16
The Scheme of Arrangement	18
Scheme consideration	22
SunRice Dividend	23
Ruling	27
SunRice Dividend	27
Assessability of the SunRice Dividend	28
Gross Up and tax offset	29
Qualified persons	31
Exempting Entity	34
Refundable tax offset	35
Capital gains tax consequences	36
<i>CGT event A1</i>	36
<i>Capital Proceeds</i>	40
<i>Anti-overlap provisions</i>	42
The anti-avoidance provisions	43
Appendix 1 – Explanation	45
SunRice Dividend	45
Assessability of the SunRice Dividend	49
Gross Up and tax offset	51
Refundable tax offset	55
Qualified persons	58
Related payment rule	61
Holding period requirement	67

Exempting entity	74
Capital gains tax consequences	77
The anti-avoidance provisions	84
<i>Section 204-30</i>	84
<i>Section 177EA</i>	95
Appendix 2 – Detailed contents list	102

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TR 2010/4

Subject references:

- arrangement
- CGT capital proceeds
- CGT event A1 – disposal of a CGT asset
- distributions
- dividend income
- franking credits
- imputation system
- ordinary shares
- qualified person
- related payment rule
- takeovers & mergers

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disposal of a CGT asset